A

WU SIEW YONG

v.

PULAU PINANG CLINIC SDN BHD & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-42-2003]
25 AUGUST 2010

C ***TORT:*** *Negligence - Medical negligence - Surgical procedure - Laparoscopic ovarian cystectomy - Failure to remove cysts - Administration of Zoladex injections - Whether defendant negligent - Whether plaintiff proved presence of cysts at time of surgery - Whether Zoladex injections a recognised and accepted treatment for plaintiff's condition*

D ***TORT:*** *Negligence - Medical negligence - Duty of care to patient - Whether breached in doctor's conduct of laparoscopy and doctor's failure to perform open surgery - Whether risk and benefit of open surgery considered*

E ***TORT:*** *Negligence - Medical negligence - Negligent acts of specialist doctor - Whether hospital vicariously liable*

The plaintiff who suffered from pain in the abdomen before menstruation and dysmenorrhoea was diagnosed to have
F endometriotic cysts in her left and right ovaries after an ultra sound scan was done by the 2nd defendant at the 1st defendant hospital. On 6 June 2001, the 2nd defendant did a surgical procedure on the plaintiff called a laparoscopic ovarian cystectomy to confirm the presence of the cysts and to remove them accordingly. However, the
G 2nd defendant saw no cysts during the procedure and as such the cysts removal could not be carried out. The plaintiff instead was administered two Zolladex injections on 7 June 2001 and 5 July 2001 respectively. The plaintiff, however, continued to have pain in the abdomen and consulted one Dr Kunasegaran (PW3) on 24 July
H 2001 and one Dr Maheran (PW4) on 6 September 2001 who both confirmed the presence of the cysts in the plaintiff's ovaries. On 8 July 2002, PW4 successfully removed the plaintiff's cysts and the plaintiff suffered no pain since then. The plaintiff then filed this action for damages against the defendants alleging professional
I negligence on the part of the 2nd defendant in failing to remove the cysts in her ovaries and for the wrongful administration of the

Zoladex injections; and that the 1st defendant was vicariously liable. The 2nd defendant maintained that there were no cysts seen during the surgical procedure on 6 June 2001 and that the Zoladex injections given to the plaintiff were an accepted form of treatment for the endometriosis the plaintiff was suffering from.

Held (dismissing the plaintiff's claim with costs):

(1) According to the evidence of all the obstetricians and gynaecologists, *ie*, PW2, PW3 and DW3, the recurrence of the endometriotic cysts within a few months after an operation was not inevitable. (para 12)

(2) The plaintiff's evidence on the presence or existence of the cysts was not corroborated by PW3 and PW4. If the cysts were not successfully removed at the time of the surgical procedure, they ought to have remained in the plaintiff's ovaries on 24 July 2001 and on 6 September 2001. However, they were not confirmed to be still there. The evidence showed that the cystic area found on 24 July 2001 by PW3 and the small cyst noted by PW4 on 6 September 2001 were ruled out to be endometriotic cysts. The fact that the plaintiff was suffering from symptoms was due to endometriosis which was a gynaecological condition that could occur with or without the formation of endometriotic cysts. It followed that the plaintiff failed to prove the presence or existence of the endometriotic cysts before and at the time the 2nd defendant performed the surgical operation on 6 June 2001. (para 13)

(3) The 2nd defendant did not breach his duty of care when he declined to carry out the open surgery as he had balanced the risk and benefit of such surgery to the plaintiff. Further, DW1 endorsed the fact that there was major blood tissues linked to major organs at the pelvis which was dangerous to operate. Moreover, PW2 subsequently confirmed that there were no endometriotic cysts. Hence the 2nd defendant was right in not to continue to perform the cystectomy or the open surgery for probing purposes which might have endangered the plaintiff. He had exercised due diligence, care, skill and knowledge in circumstances where the danger to the patient's safety outweighed the necessity to perform an investigatory operation. In the circumstances, the 2nd defendant was not negligent in the conduct of the laparoscopy. (para 17)

(4) The evidence of all the obstetricians and gynaecologists, *ie*, PW2, PW3, PW4 and DW3 showed that Zoladex injections were the recognised and accepted medication for the treatment of endometriosis. It followed that the administration of the Zoladex injections on the plaintiff was not wrongful. Furthermore, they were administered with the plaintiff's consent. (para 20)

(5) The 1st defendant was not vicariously liable for the 2nd defendant's allegedly negligent acts on the following grounds: (a) the 2nd defendant was free to operate his own clinic; (b) the 2nd defendant had full control over his own clients/patients in their treatment, management and care; (c) the 1st defendant did not remunerate the 2nd defendant and the deduction of 22.5% of the gross fees earned by the 2nd defendant was only payment for the usage of the hospital facilities provided by the 1st defendant; (d) the 2nd defendant had to take out an insurance coverage of his own during the subsistence of the agreement with the 1st defendant whereas in an employer-employee relationship, the insurance coverage of an employee would be generally provided for by the employer if the employee was not covered under SOCSO; (e) the 2nd defendant's 30-day leave allowed by the 1st defendant was subject to the fact that the 2nd defendant had to arrange for a replacement consultant whereas in an employer-employee relationship, it was the duty of the employer to arrange for the replacement worker and not that of the employee; and (f) the negligent and wrongful acts complained of by the plaintiff were in relation to the personal acts of the 2nd defendant in the treatment, management and care of the plaintiff which the 2nd defendant retained full control of. (paras 22 & 23)

Case(s) referred to:

Chien Tham Kong v. Excellent Strategy Sdn Bhd & 2 Ors [2008] 1 LNS 411 HC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Mathew Scott Oakley & 2 Ors v. Dr George Varughese & Anor [2009] 1 LNS 1474 HC ***(refd)***

Payremalu Veerappan v. Dr Amarjeet Kaur & Ors [2001] 4 CLJ 380 HC ***(refd)***

Tan Eng Siew & Anor v. Dr Jagjit Singh Sidhu & Anor [2006] 5 CLJ 175 HC ***(refd)***

For the plaintiff - Lim Boo Chang; M/s Lim Boo Chang & Co
For the 1st defendant - Harjit Singh; M/s Lawrence Pereira & Partners
For the 2nd defendant - Jj Chan; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Chew Soo Ho JC:

[1] Plaintiff consulted the 2nd defendant on 21 May 2001 with the history and complaint of pain in the abdomen before menstruation and dysmenorrhoea, *inter alia*. The 2nd defendant is an Obstetrician and Gynaecologist practising at the Gleneagles Medical Centre ('the hospital'), wholly owned and operated by the 1st defendant. Through an ultra sound scan, plaintiff was diagnosed clinically to have endometriotic cyst in her left and right ovary. She was admitted to the Hospital on 5 June 2001 for surgical procedure called laparoscopic ovarian cystectomy. On 6 June 2001, 2nd defendant performed the laparoscopy on the plaintiff to confirm the presence of the two endometriotic cysts and forthwith to remove them. After the laparoscopy, however, no cyst was seen and cystectomy was thus not carried out. Plaintiff was then given injection of Zoladex. However, despite the laparoscopy having been done, plaintiff still suffer the same complaint of pain. She subsequently visited the Sungai Petani Hospital where after scanning, plaintiff suspected that she still had the cysts which 2nd defendant did not remove. On 8 July 2002, Dr. Benny Khaw from Singapore Women's Specialist Centre had successfully removed plaintiff's two endometriotic cysts and she did not suffer the same complaint since then. Plaintiff alleged that the 2nd defendant had breached his duty of care to the plaintiff in failing to remove the endometriotic cysts in her left and right ovary during the laparoscopy performed on 6 June 2001 and had wrongfully administered two Zoladex injections on the plaintiff on 7 June 2001 and 5 July 2001. She filed this action for damages alleging professional negligence on the part of the 2nd defendant. The 1st defendant is sued for vicariously liable since it was its Hospital that the 2nd defendant performed the laparoscopy procedure. 2nd defendant denied all allegations of negligence and contended that there were no endometriotic cysts seen during the laparoscopy

A conducted on 6 June 2001 on the plaintiff and the two Zoladex injections given to the plaintiff are an accepted form of treatment for the endometriosis that the plaintiff was suffering from.

The Issues

B **[2]** The main complaints of the plaintiff herein this case are the failure of the 2nd defendant to successfully remove the two endometriotic cysts in her ovary and the wrongful administering of two Zoladex injections on her. Hence the issues can be deduced as follows:

C

(i) Whether plaintiff had in actual fact two endometriotic cysts in her ovary before and at the time laparoscopy was performed by 2nd defendant on 6 June 2001;

D (ii) Whether 2nd defendant was negligent in the course of performing the laparoscopy;

(iii) is it wrongful for 2nd defendant to administer two Zoladex injections on the plaintiff after laparoscopy; and

E (iv) is the 1st defendant vicariously liable for the act of the 2nd defendant.

Evaluation & Findings

F **[3]** Learned counsel for the 2nd defendant has submitted the cases of *Chien Tham Kong v. Excellent Strategy Sdn. Bhd. & 2 Ors* [2008] 1 LNS 411, *Mathew Scott Oakley & 2 Ors v. Dr. George Varughese & Anor* [2009] 1 LNS 1474 and *Payremalu Veerappan v. Dr Amarjeet Kaur & Ors* [2001] 4 CLJ 380 pertaining to the plaintiff's burden to prove negligence against the defendants on the basis that what was done was what a reasonably competent practitioner skilled in that particular art would not have done or would have done and that the negligence, if proved, would result in damages to the plaintiff; it is not for the defendants to disprove the allegations of negligence contained in the statement of claim. I find the law is trite in relation to the burden and standard of proof. There is no doubt about that and it does not need reiteration.

G

H

I

1st Issue: Whether Plaintiff Had In Actual Fact 2 Endometriotic Cysts In Her Ovary Before And At The Time Laparoscopy Was Performed By The 2nd Defendant On Her On 6 June 2001

[4] From the facts of the case, it is undisputed that plaintiff had a history of endometriosis dated back to October 1999 when she consulted Dr. Benny Khaw (PW2) from Singapore Women's Specialist Centre and in December 1999, she had undergone a bilateral cystectomy performed by Dr. Kunasegaran (PW3) of Sungai Petani Hospital to remove an endometriotic cyst in her left ovary and an endometriotic cyst in her right ovary. Endometriosis is a gynaecological condition where the cells similar to the lining of the uterus appears outside the uterine cavity most commonly on the ovaries. It can occur with or without the formation of endometriotic cysts, also known as endometrioma and endometriosis will occasion the symptoms of pelvic pain, painful menstruation, painful sexual intercourse and infertility.

[5] Evidence of the plaintiff (PW1) showed the chronological events that took place as follows:

(a) On 15 May 2001, PW1 visited Dr. K. Kunasegaran (PW3) at Sungai Petani Hospital. PW3 discovered two cysts in plaintiff's ovaries.

(b) On 21 May 2001, plaintiff consulted the 2nd defendant at Gleneagles Medical Centre, the Hospital, who made the decision to carry out operation to remove the two cysts.

(c) On 5 June 2001, plaintiff was admitted into the Hospital.

(d) On 6 June 2001, plaintiff was operated on and she stayed in the Hospital until 8 June 2001. Plaintiff stated that 2nd defendant informed her that operation to remove the two cysts was successful.

(e) On 7 June 2001 ie, the follow up consultation, the 2nd defendant gave the 1st Zoladex injection to plaintiff.

(f) On 5 July 2001, the 2nd Zoladex injection was administered.

(g) Plaintiff however continued to suffer the pain from her ovaries.

(h) Plaintiff went to see Dr. K. Kunasegaran (PW3) at Sungai Petani Hospital and Dr. K. Kunasegaran asked her to obtain her medical report from the 2nd defendant.

(i) On 23 July 2001, plaintiff saw the 2nd defendant who agreed *albeit* reluctantly and gave her medical report to her.

(j) On 24 July 2001, plaintiff saw Dr. K. Kunasegaran with her medical report. Dr. K. Kunasegaran read the report and said that the cysts were not successfully removed. A scan was done. Plaintiff said Dr. K. Kunasegaran showed her two pictures of the scan of her cysts and told her that she had to undergo another operation to remove the two cysts. Plaintiff, however, intimated that she would try on traditional herbs.

(k) On 6 September 2001, plaintiff went to Sungai Petani Hospital for appointment with Dr. K. Kunasegaran but was attended by Dr. Maheran bt. Rozali (PW4) who is also an Obstetrician and Gynaecologist. PW4 did a scan and discovered two cysts were still there.

(l) On 24 June 2002, plaintiff visited Dr. Benny Khaw Soo Beng (PW2) at Tanjong Medical Centre Penang. Dr. Benny Khaw confirmed the two cysts in plaintiff's ovaries.

(m) On 8 July 2002, plaintiff was operated by Dr. Benny Khaw who had successfully removed the two cysts from her ovaries.

[6] In brief, what the plaintiff had narrated in evidence is that Dr. K. Kunasegaran (PW3) had diagnosed her with two cysts and 2nd defendant whom she consulted also confirmed the presence of the two cysts. Plaintiff opted to 2nd defendant instead of Dr. K. Kunasegaran to conduct the operation to remove her two cysts because she wished to make use of her medical insurance. After the operation by the 2nd defendant, plaintiff continued to experience the same problem of pain and when she went back to Dr. Kunasegaran, it was discovered that the operation conducted by the 2nd defendant had failed to remove the two cysts in her ovaries. This result was allegedly from the scan performed by Dr. Kunasegaran and it was also alleged that the subsequent scan done by Dr. Maheran also confirmed the presence of the said two cysts. It is thus pertinent to look into the evidence of both Dr. Kunasegaran (PW3) and Dr. Maheran bt. Rozali (PW4) whether two cysts still existed after the operation conducted on her by the 2nd defendant.

[7] According to Dr. Kunasegaran, he first saw the plaintiff on 12 December 1999 for secondary infertility and ultrasound showed cystic ovaries. He conducted laparoscopy on the plaintiff which showed bilateral ovarian endometriotic cysts and a bilateral

cystectomy was done to remove the two cysts. On 15 May 2001 of about 1 1/2 years later, Dr. Kunasegaran saw the plaintiff again and ultrasound showed probable recurrence of endometriosis, cystectomy was supposed to be carried out on 6 June 2001 but plaintiff defaulted. On 24 July 2001, plaintiff returned and informed him that she was operated in a private hospital. Dr. Kunasegaran did an ultrasound scan on the plaintiff which showed an irregular cystic area in plaintiff's pelvis measuring 4 x 3 cm suspected of recurrent endometrioma. When plaintiff came back for a re-scan on 6 September 2001 which was carried out by Dr. Maheran, it showed a small cyst which Dr. Kunasegaran ruled to be no significant findings.

[8] Dr. Maheran (PW4) confirmed in her evidence that she attended to the plaintiff on 6 September 2001. Upon examination, she found plaintiff to be well, not-suffering from any pain and also not having her menstrual flow yet. During an ultrasound examination, PW4 noted that plaintiff had a small cyst measuring about 2.5 x 2.6 cm. In respect of this small cyst, Dr. Kunasegaran who is the superior of Dr. Maheran said in cross-examination that he could not say whether this 2.5 x 2.6 cm in the diagram which was a cystic area could be a tumour or a collection of blood, fluid or inflammatory fluid. He stated in order to confirm endometriosis with cysts he had to perform a laparoscopy or open surgery but since plaintiff had defaulted on 6 June 2001, laparoscopy was not carried out and hence he could not confirm whether plaintiff had endometriosis cysts. He added that from his opinion, the lesion or irregular cystic area measuring 4 x 3 cm from ultrasound done on 24 July 2001 which had shrunk to 2.5 x 2.6 cm on 6 September 2001 of almost half the size, is unlikely to be endometrioma.

[9] Dr. Maheran indeed said further that she could not confirm conclusively whether the cyst she saw on 6 September 2001 was an old one or a recurrence. She added that the cyst was too small and that was why it was insignificant. In cross-examination, Dr. Maheran said she could not say whether the cyst she saw on 6 September 2001 was endometriotic cyst. She agreed that basing on the symptoms, it was unlikely to be endometriosis; however she could not confirm.

[10] Evidence of 2nd defendant showed that ultrasound examination carried out on the plaintiff suggested a cyst with echoes within in the right adnexa and a similar cyst in the left

adnexa. As requested by the plaintiff, 2nd defendant performed laparoscopy, adhesiolysis and a dilatation and curettage on the plaintiff on 6 June 2001 but found no endometriotic cyst on both left and right ovaries. No chocolate fluid was drained upon aspiration of the cystic right ovary but fresh blood was obtained signifying no endometriotic cyst present. Laparoscopic ovarian cystectomy was therefore not required. DW3, Dato' Dr. Alex Mathews who is a Consultant Obstetrician and Gynaecologist at Gleneagles Intan Medical Centre, Kuala Lumpur and Vice President of the College of Obstetrician and Gynaecologists, Academy of Medicine Malaysia who has been practicing obstetrics and gynaecology for the past 31 years testified that an ultrasound examination is useful to determine the presence of endometriotic cysts but the findings are not always conclusive; a visual inspection of the pelvis by way of laparoscopy (an operation) is the gold standard investigation to confirm the presence of endometriosis. He opined that if fresh blood was drawn instead of chocolate fluid upon an aspiration of the plaintiff's cystic ovary, it means an endometriotic cyst is not likely to be present in the ovary. Dr. Alex commented that although Dr. Kunasegaran had stated that the ultrasound carried out on 4 July 2001 showed an irregular cystic area measuring 4 x 3 cm suspicious of recurrent endometrioma, a repeat ultrasound carried out on 6 September 2001 by Dr. Maheran showed no significant findings. The irregular cystic area seen by Dr. Kunasegaran on ultrasound on 24 July 2001 could not, according to Dr. Alex, have been an endometriotic cyst because an endometriotic cyst would certainly not have spontaneously cleared six weeks later by 6 September 2001 as noted from the repeat ultrasound carried out by Dr. Maheran. He said the cyst noted by Dr. Maheran measuring 2.5. x 2.6 cm could have been a temporary collection of fluid after surgery, a collection of blood or even a follicle and it is unlikely to be a endometriotic cyst as endometriotic cyst could not have shrunk or reduced in size from 4 x 3 cm as noted on ultrasound by Dr. Kunasegaran on 24 July 2001 to 2.5 x 2.6 cm from the ultrasound done by Dr. Maheran on 6 September 2001.

[11] As to the two endometriotic cysts measuring 3.2 x 3.0 cm and 3.9 x 3.0 cm respectively removed by Dr. Benny Khaw (PW2) on 8 July 2002 successfully of more than one year later, all specialist doctors PW2, PW3 and DW3 held the same view that new cyst can form within one or two months (from PW2) or six weeks after operation – size variable (from PW3) or within two to three months (from DW3).

[12] From all the evidence of the plaintiff and her witnesses above, what the plaintiff had alleged is that after the laparoscopy done by the 2nd defendant on 6 June 2001, Dr. Kunasegaran had on 24 July 2001 and Dr. Maheran had on 6 September 2001 confirmed that the two cysts supposedly to have been operated and removed by the 2nd defendant were still present signifying that the 2nd defendant had negligently performed the laparoscopic ovarian cystectomy to remove the two cysts. However, evidence of Dr. Kunasegaran showed otherwise that on 24 July 2001, from the ultrasound performed on the plaintiff, it showed only an irregular cystic area measuring 4 x 3 cm and Dr. Maheran noticed a small cyst measuring 2.5 x. 2.6 cm from an ultrasound done on the plaintiff on 6 September 2001 which was subsequently described by Dr. Kunasegaran to be insignificant as he held the view that it is unlikely to be endometrioma or endometriotic cyst for reason that the irregular cystic area that he saw on 24 July 2001 had shrunk to 2.5 x 2.6 cm on 6 September 2001 of almost half the size. In other words, if it is endometriotic cyst, it could not have shrunk in size between 24 July 2001 to 6 September 2001 when there was no surgical intervention during this period. It is manifestly clear that the evidence of the plaintiff is totally contradicted by PW3 and PW4 who had never confirmed the presence of two cysts after the laparoscopy conducted by the 2nd defendant. Dr. Alex Mathew, DW3, shared the same view as Dr. Kunasegaran. From 2nd defendant's clinical examination from the ultrasound images taken of the plaintiff (bundle H p. 2), there appeared two dark spots suspected of cysts. However, when laparoscopy was conducted on the plaintiff to ascertain the presence of cysts and to remove them, 2nd defendant could not visualize any cysts. Thus, if it is the contention of the plaintiff that the two cysts still remained in her ovaries and that the 2nd defendant had been negligent in failing to remove them, plaintiff must prove the presence or existence of the two cysts after her operation by the 2nd defendant on 6 June 2001. However, there is no evidence from PW3 and PW4 of the presence or existence of the two cysts on 24 July 2001 and 6 September 2001 Even Dr. Maheran's allegation of a small cyst was ruled out by Dr. Kunasegaran to be an endometriotic cyst. The plaintiff has therefore failed to prove that from 6 June 2001 to 6 September 2001, she was still having the two endometriotic cysts which were supposedly to have been removed by the 2nd defendant as alleged. The findings of Dr. Kunasegaran who is also the Head of

A Department of Obstetrics and Gynaecology, Sungai Petani Hospital and superior of Dr. Maheran had ruled out the presence of endometriotic cysts in the ovaries and pelvis area of the plaintiff. These findings are consistent with 2nd defendant's result after laparoscopy carried out on 6 June 2001 that he could not see any
B cyst. The evidence of DW3 further confirmed the findings of Dr. Kunasegaran and 2nd defendant that there was no cysts. The fact that Dr. Benny Khaw had on 8 July 2002 removed two endometriotic cysts from the plaintiff cannot be the basis to contend that these two cysts were the same two cysts which the 2nd
C defendant had failed to remove on 6 June 2001 for reasons that the laparoscopy ovarian cystectomy was performed by Dr. Benny Khaw more than one year after 2nd defendant had done the laparoscopy and that endometriotic cysts can recur even shortly after operation, Although 2nd defendant did not remove any cyst on 6 June 2001,
D it must be noted that plaintiff had undergone an earlier bilateral cystectomy performed by Dr. Kunasegaran to remove an endometriotic cyst in her left and another in her right ovary sometimes in December 1999. According to PW2, PW3 and DW3, all of whom are experts Obstetricians and Gynaecologist, the
E recurrence of endometriotic cysts seems common phenomena and can even occur within one to a few months after an operation; it is therefore not inevitable.

[13] From all the evidence before this court, I find that evidence
F of the plaintiff was not only uncorroborated by PW3 and PW4 of the presence or existence of the two endometriotic cysts but was directly contradicted by them, in particular by PW3. If two cysts were present before and at the time of laparoscopy performed by the 2nd defendant on 6 June 2001 and were not successfully removed,
G they ought to remain in the plaintiff's ovaries on 24 July 2001 and 6 September 2001 but they were not confirmed to be still there. The cystic area found on 24 July 2001 and the small cyst noted by Dr. Maheran on 6 September 2001 were ruled out by Dr. Kunasegaran to be endometriotic cysts. There was in fact no
H endometriotic cysts. The fact that plaintiff was suffering from the symptoms was due to endometriosis which is a gynaecological condition that can occur with or without the formation of endometriotic cysts. (see D34 Q & A10). Consequently, I find that the plaintiff had failed to prove the presence or existence of the two
I endometriotic cysts before and at the time the 2nd defendant performed the laparoscopy on her on 6 June 2001. The facts have

clearly shown that there was no endometriotic cysts bearing in mind that the actual confirmation of the presence of endometriotic cysts is by laparoscopy and not by ultrasound scan. All plaintiff's witnesses Dr. Benny Khaw, Dr. Kunasegaran and Dr. Maheran endorsed that an ultrasound scan is not conclusive without a laparoscopy. Ultrasound was thus not conclusive proof to ascertain the presence or existence of cysts; ultrasound was only a probability and plaintiff cannot base her case on mere ultrasound finding.

2nd Issue: Whether The 2nd Defendant Was Negligent In The Course Of Performing The Laparoscopy

[14] There is indeed no medical or expert evidence adduced by the plaintiff to prove the negligence of the 2nd defendant in the conduct of the laparoscopy as pleaded. It appears that plaintiff attempted to rely solely on her assumption from what she was told by Dr. Kunasegaran and Dr. Maheran that the two cysts which were supposedly to have been removed were still there and hence 2nd defendant must be negligent in failing to remove them. However, bereft of any evidence, this court cannot even draw any inference as to any negligence on the 2nd defendant in the conduct of laparoscopy on the plaintiff.

[15] Evidence of 2nd defendant (DW2) showed that he had based his clinical finding of the two cysts deriving from the images of the ultrasound scan *vide* bundle H p. 2 (the original print was shown to court and counsel during trial). Plaintiff consented to having laparoscopy varian cystectomy and it was performed on 6 June 2001 but no obvious endometriotic cyst was seen. Aspiration of the cystic left ovary were attempted but only blood was obtained and there was no chocolate fluid to signify the presence of cyst.

[16] Plaintiff's doctors PW2, PW3 and PW4 did not adduce any evidence to allege that by performing laparoscopy, there is a lack or breach of duty of care by the 2nd defendant to the plaintiff. Evidence of Dr. Alex Mathews (DW3) when being referred the ultrasound images in bundle H p. 2 held the same view as the 2nd defendant that there is possibility of one cyst at the right and one at the left ovary basing on the plaintiff's history of having pain at that part of her anatomy. This is the descriptive aspect of these images. From the interpretative aspect of these images, the suspected cysts could be functional cysts or a large blood vessel

seen in cross-section; it could also be a collection of fluid that surrounds the ovary but not inside the ovary that can sometimes take place after earlier surgery in the pelvis. Dr. Alex also opined that it will rightly benefit the plaintiff to have a procedure to remove the endometriotic cyst if there is a cyst. Dr. Alex as well as Dr. Kunasegaran agree that laparoscopy is the procedure which will confirm affirmatively the presence of endometriotic cysts. Since the 2nd defendant could not visualize any cyst through laparoscopy and had made the clinical judgment that open surgery might pose risk to plaintiff in view of the dense adhesions at the pelvis of the plaintiff he did not perform the cystectomy nor the open surgery. From the findings on laparoscopy, the 2nd defendant had informed the plaintiff that laparoscopic ovarian cystectomy would not be required. Dr. Alex Mathews testified that the 2nd defendant had accorded the plaintiff appropriate management and treatment.

[17] There is no doubt that there is a duty of care owed by a doctor to his patient; without this doctor patient relationship, there is no duty on the doctor to diagnose, advise and treat his patient; see *Foo Fio Na v. Dr. Soo Fook Mun & Anor* [2007] 1 CLJ 229 FC. With the special skill and knowledge, the doctor owes a duty to the patient to use his skill, knowledge, diligence and care in administering the treatment. However, I find no evidence that the 2nd defendant has breached his duty of care to the plaintiff in the management and treatment of the plaintiff or that 2nd defendant had been negligent in the conduct of laparoscopy which is to ascertain the presence of endometriotic cysts before the laparoscopic ovarian cystectomy could be performed to remove them. I also do not find the 2nd defendant to have breached his duty of care when he declined to carry out open surgery as he had balanced the risk and benefit of such open surgery to the plaintiff. Dr. Alex also endorsed the fact that there are major blood tissues linked to major organs at the pelvis which is dangerous to operate. In fact, as subsequently confirmed by Dr. Kunasegaran, there was no endometriotic cysts. Hence the decision of 2nd defendant was right that he did not continue to perform cystectomy or open surgery for probing purposes which might endanger the plaintiff. He had exercised due diligence, care, skill and knowledge in circumstances where the danger to the patient's safety outweighed the necessity to perform an investigatory operation. On a positive finding of facts, I do not find the 2nd defendant to be negligent in the conduct of the laparoscopy in this case.

3rd Issue: Is It Wrongful For 2nd Defendant To Administer Two Zoladex Injections On The Plaintiff After Laparoscopy

[18] According to the 2nd defendant, after the laparoscopy, he had discussed with the plaintiff whether plaintiff would consider having Zoladex because of the plaintiff's history of endometriosis which she continued to suffer. Zoladex injections are accepted form of treatment for patients suffering from endometriosis whether with or without endometriotic cysts. 2nd defendant said plaintiff agreed and 2nd defendant then administered the 1st injection on 7 June 2001. Plaintiff complained that the injection was painful and did not wish to have a further injection during her follow up consultation on 5 July 2001. However, she changed her mind on 5 July 2002 and hence the 2nd Zoladex injection was administered.

[19] From 2nd defendant's evidence, it indirectly shows that the administering of Zoladex injections on the plaintiff was after consultation with the plaintiff and it was administered with her full consent. The question is whether Zoladex injection is beneficial to the plaintiff in the treatment of the plaintiff's endometriosis. If it is not, such administering could be construed as wrongful; otherwise, it will not be. Evidence of Dr. Benny Khaw (PW2) established a fact that he too gave six courses of Zoladex injections to the plaintiff to be administered one per month after her laparoscopic bilateral cystectomy performed by him. PW2 stated in examination-in-chief in his oral evidence in court that after an operation, a patient is required to have Zoladex injection to prevent recurrence. Even without an operation, patient could have Zoladex injection as an alternative treatment. Dr. Kunasegaran (PW3) also expressed that Zoladex injections can be beneficial to patient with endometriosis. Though there is side effect, it is not harmful and can help to treat the patient. Generally, according to PW3, Zoladex would not be prescribed if Obstetricians and Gynaecologists do not suspect endometriosis but Zoladex will benefit patient with endometriosis. PW4, Dr. Maheran similarly endorsed the advantages in the prescription of Zoladex. She said she would still prescribe Zoladex even though her operation on the patient was successful. In situation where it was highly unlikely to see the endometriotic spots when laparoscopy was done, Zoladex would be administered. Dr. Alex Mathews (DW3) also expressed the view that the Zoladex injections administered by the 2nd defendant to the plaintiff are beneficial to treat the plaintiff's long standing endometriosis even though there were no endometriotic cyst present in the plaintiff's ovaries.

[20] From the evidence of all the Obstetricians and Gynaecologists, PW2, PW3, PW4 and DW3, there is no doubt that Zoladex injections are the recognized and accepted medication for the treatment of endometriosis. Plaintiff has had a history of endometriosis and her complaints indicated the recurrence of endometriosis. According to PW4, Dr. Maheran, there is no cure for endometriosis except to make the patient menopause. For the 2nd defendant to prescribe and administer Zoladex injections on the plaintiff, it cannot be said to be wrongful since this is the recognized and accepted prescription for endometriosis which plaintiff had the history and her symptoms as complained indicated recurrence of endometriosis even though 2nd defendant did not see the endometriotic cysts from the laparoscopy done. I find that what the 2nd defendant had administered on the plaintiff of Zoladex was the recognized beneficial medication for plaintiff who suffered from the similar symptoms of endometriosis. I do not find in the circumstances that 2nd defendant had acted wrongfully in administering Zoladex injections on the plaintiff. After all, it was also with her consent.

4th Issue: Is The 1st Defendant Vicariously Liable For The Act Of The 2nd Defendant

[21] This issue is only relevant if the 2nd defendant is found to be liable to the plaintiff on professional negligence and wrongful administering of Zoladex injections. Nevertheless, for completeness, evidence and submissions by all parties are considered. From exh. D18 which is the agreement between the 1st defendant and Kaysibeng Sdn. Bhd., the 2nd defendant's company, the 2nd defendant was allowed to practice as an Independent and Freelance Consultant & Gynaecologist at the Hospital. 1st defendant submitted that there is no employer-employee relationship between the 1st and 2nd defendant; the 2nd defendant has clients of his own, operates his own clinic at the Hospital but was the operating facilities of the Hospital which he has to pay a percentage of his charges on his clients. 2nd defendant also had full control over the treatment, management and care of the plaintiff as well as the amount of fees charged. Hence, 1st defendant submitted that they are not liable for the act of the 2nd defendant. Plaintiff contended that *vide* the said agreement D18, 1st defendant is taking 22.5% of the gross fees earned by the 2nd defendant as consideration *vide* cl. 5 and by cl. 6, the 1st defendant grants the 2nd defendant 30

days vacation leave. Plaintiff submitted that these two clauses connote an employer-employee relationship. In *Tan Eng Siew & Anor v. Dr. Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175 as cited by learned counsel for the 1st defendant, His Lordship James Foong J (now FCJ) has well summarized the tests applicable in determining whether there is special relationship between the defendants to constitute vicarious liability when His Lordship said at p. 186:

> [35] To ascertain whether such special relationship exists, the courts have devised various tests. The first is the control test as laid down in *Short v. J & W Henderson Ltd* [1946] 62 TLR 427 at p 429. Here the criteria are: first, the power of selection of the employer; second, power in determining salary or other remuneration; third, power or right of the employer to control the method in which the work was done; fourth, power and right of the employer to terminate the employee's services.
>
> [36] Then there is the organizational tests. This is laid down in *Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans* [1952] 1 TLR 101 at page 111. Here the court examines the wrongdoer's work in relation to organization set up by the party who is alleged to be vicariously liable for his action.
>
> [37] Finally, there seem to be a third test known as-the multiple test adopted by the courts as shown in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 which is said to be based on the common sense approach.
>
> [38] All in all, what that is necessary for the second plaintiff to establish in this case against the second defendant is that whether the second defendant has a control over the first defendant to create a form of special relationship that can cause the second defendant to be vicariously liable for the wrongdoing of the first defendant, if proven.

[22] Having perused the whole agreement D18 as well as the evidence produced and applying the tests as laid down above, I am inclined to agree with the submission by the 1st defendant that there is an absence of such special relationship between 1st defendant and 2nd defendant on the following grounds:

1. The 2nd defendant is free to operate his own clinic, accepting whosoever patients he wants and the 2nd defendant is at liberty to charge a different fee from the patient despite there is a schedule of fees.

2. The 2nd defendant has full control over his own clients/patients in their treatment, management and care. He controls over his own work and the method he wishes to perform his work.

3. The 1st defendant does not pay any remuneration to the 2nd defendant but conversely, the 2nd defendant would have to allow 22.5% of his gross fees earned to be deducted towards usage of 1st defendant's facilities (cl. 5 D18). Bearing in mind that the 1st defendant is providing all the facilities of a hospital to the 2nd defendant, the deduction of 22,5% of the gross fees earned by the 2nd defendant can only be construed as payment by the 2nd defendant for such usage of those facilities only. I do not agree with the plaintiff's contention that such payment connotes a special relationship of an employer-employee.

4. The 2nd defendant will have to immediately take out insurance coverage and shall maintain such policies to keep himself insured at all times during the subsistence of the agreement with the 1st defendant. (Clause 7(f) D18). If there is such an employer-employee relationship as contended by the plaintiff, insurance coverage of an employee would be generally provided by employer if the employee is not covered under SOCSO.

5. On cl. 6 which provides that the 1st defendant shall allow the 2nd defendant 30 days leave in every calendar year, plaintiff contended this shows the special relationship of employer-employee. Reading the 2nd paragraph that follows in cl. 6, which requires the 2nd defendant to arrange and secure the services of a consultant colleague to provide cover during any period of leave, it corroborated evidence of the 1st defendant that there should be no vacancy of any consultant in attendance as the Hospital must have a consultant at all times. If there is employer-employee relationship as contended by the plaintiff, when the employer who retains his full discretion to approve vacation leave and once the leave of the employee is approved, it becomes the duty of the employer to arrange for a replacement worker and not the duty of the employee to find such a replacement before he goes on his vacation leave.

6. The negligent act and wrongful act complained of by the plaintiff are in relation to the personal acts of the 2nd defendant in the treatment, management and care of the plaintiff which the 2nd defendant retains full control. Therefore, 1st defendant cannot be said to be vicariously liable.

[23] Consequently, I do not find, that vicarious liability can be attributed to the 1st defendant.

Conclusion

[24] For the foregoing reasons and upon a finding of facts, I hold that the plaintiff had failed to prove her claim on a balance of probabilities. Therefore, plaintiff's claim is dismissed with costs of RM10,000 to each defendant.